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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-850

AHARON RON,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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November 26, 1973

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No.

AHARON RON,

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Aharon Ron, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this proceeding on October 31, 1973, (*infra*, pp. 1a-2a), affirming the judgment of the United States District Court for the Southern District of New York, entered on April 23, 1973.

Opinion Below

No opinion was rendered in this proceeding by either the Court of Appeals or the District Court.

Jurisdiction

The judgment of the Court of Appeals was entered on October 31, 1973. This petition for certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The District Court's jurisdiction was invoked under 18 U.S.C. § 3231.

Question Presented

Is the indictment of a grand jury constitutionally valid and sufficient which is based upon a written memorandum prepared by an F.B.I. agent from notes taken at interviews with the Government's chief witness, where the witness himself appears before the grand jury, but is excused at the request of the Government attorney after testifying that the memorandum contains a fair and accurate summary of his knowledge of its subject matter?

Constitutional Provisions Involved

United States Constitution, Fifth Amendment:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ."

United States Constitution, Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

Statement of the Case

On February 24, 1972, petitioner Aharon Ron and five others—Collin Garner, Frederick Lee, William Champion, Louis Beck and Emanuel Lieberman (better known as "Mannie Lester")—were charged under an indictment with four counts of wire fraud (18 U.S.C. § 1343), one count of

mail fraud (18 U.S.C. § 1341), one count of transporting goods as part of a scheme to defraud (18 U.S.C. § 2314), and one count of conspiring to commit the foregoing offenses (18 U.S.C. 371).

On April 23, 1973, after trial, petitioner was convicted on all counts of the indictment except, inexplicably, the fourth count of wire fraud, sentenced to prison for two consecutive terms of five years, and fined $5,000.

Garner and Lee were convicted only on the conspiracy count, and were given substantially lighter sentences. Champion was acquitted on all counts except that for conspiracy, on which, in his case, the jury failed to arrive at an agreement. In Beck's case, the jury could not reach agreement on any count. At the time of the trial, Lester was serving a jail sentence in Canada.

Both in the grand jury proceeding and at the trial, the Government's case rested upon certain critical facts to which only one Joseph Hagins was prepared to testify. Hagins, a self-confessed confidence man, claimed to have been a key member of the conspiracy alleged in the indictment, although he was not named as a defendant therein. It is the crux of the present petition that Hagins appeared in person before the grand jury, but, thanks to the procedure followed by the Government attorney, managed to avoid telling any part of his story to that body.

Specifically, in his appearance before the grand jury, Hagins was asked by the Government attorney to do no more than to identify a memorandum prepared by an F.B.I. agent from notes taken at interviews with the witness, to state that he had read the memorandum before coming into the grand jury room, and to answer in the affirmative when

asked if it contained "a fair and accurate summary of the knowledge you have concerning the activities it discusses." Immediately thereafter, at the request of the Government attorney, Hagins was excused by the foreman, and the F.B.I. agent's memorandum was read by the Government attorney to the grand jury.

Because a substantial amount of live testimony given by other witnesses in this case who had appeared before a prior grand jury was also read by the Government attorney to the indicting grand jury, that attorney advised the latter body that "it was their prerogative to hear . . . in person the witnesses whose prior testimony had been read to them. . . ."

As it appeared in the F.B.I. agent's memorandum and as it was told in greater detail by the witness himself at the trial, Hagins' story tended to prove that he had acted as an intermediary in the conspiracy alleged in the indictment between two separate and distinct groups among the conspirators who had otherwise no contact with, or even knowledge of, each other. According to Hagins' story, one group, consisting of Garner, Lee and Champion, had arranged the theft of the securities involved in the conspiracy, after which the other group—Beck, Lester and petitioner Ron—had arranged the sale of a portion of the securities, and of the first group only Garner had met with any member of the second, and he had met only with Lester when Hagins had brought them together. The lack of contact between the two groups is critical because Beck, who was not convicted, as well as petitioner, while admitting participation in the sale of a portion of the securities, denied any knowledge that they had been stolen.

According to Hagins, in October 1969, in New York City, he had arranged through Garner, whom he had just

met for some other illicit purpose, to introduce him to Lee and Champion, who were then employees of the stock brokerage firm of Goodbody and Company, and Hagins had thereupon persuaded Lee and Champion to make available to Lester, who was presumably well known to Hagins, some $850,000 worth of stolen Leasco Data Systems Corporation warrants and a Goodbody tax stamp with which to effectuate the sale of the warrants, on the premise that Lester would in relatively short order pay them 50% of the face value of the warrants.

It was when Hagins' story centered on petitioner Ron that the version in the F.B.I. agent's memorandum, which was read to the grand jury and led to petitioner's indictment, differed most dramatically from the version in Hagins' own testimony at the trial. In both versions, Hagins is either reported as asserting, or he actually asserted, that after the delivery of the Leasco warrants to Lester, when Hagins was pressing Lester for money for Garner, Lee, Champion and himself, Lester had described petitioner to Hagins as Lester's financial backer; that Lester had thereupon given Hagins a check made by petitioner to Hagins' order for $5,000; that petitioner had thereafter given Hagins two or three more checks, although only one of them was for as large an amount as the first; that petitioner had indicated to Hagins knowledge of the negotiations for the sale of the warrants and petitioner's expectation that Lester would invest his share of the proceeds in ventures in which petitioner was interested; and, lastly, that petitioner had introduced Hagins to Beck, and had told Hagins that he could speak freely to Beck.

In the F.B.I. agent's memorandum, however, Hagins is described as stating that when petitioner had discussed with him the negotiations for the sale of the Leasco war-

rants, petitioner had asked if the warrants had been stolen, and Hagins had answered affirmatively. In Hagins' testimony at the trial, the witness said nothing of the sort.

Moreover, in the F.B.I. agent's memorandum, Hagins is quoted to the effect that "he also realized that Beck had to know the securities were stolen." Since, in his testimony at the trial, Hagins would not have been permitted to express any such opinion, he was not even asked to do so.

As indicated above, Hagins' story contained the critical allegations of fact on which, in both the grand jury proceeding and at the trial, the Government's case against petitioner Ron rested. (The same is true of the Government's case against Garner, Lee, Champion and Beck, particularly the first three named defendants, who concededly had nothing to do with the sale of a portion of the Leasco warrants and who, except for Hagins' story, were not connected in any way with the theft of the warrants.) The other evidence showed merely that petitioner had introduced Beck, whom he had previously known, to Lester, whom he had also previously known, without reference to the Leasco warrants, that Beck, an attorney, had thereafter learned directly from Lester of the existence of the warrants, and had also arranged directly with Lester for the sale of approximately $300,000 worth of the warrants and the delivery of the proceeds of the sale.

Indeed, when Beck arranged the sale, which he in turn effected through the agency of the Rawson Trust Company, located in the Bahamas, he was required by Rawson to sell for his own account rather than for the account of one Michael C. Van Beuren, for whom, at Lester's directions, he had asked Rawson to act. After Rawson had effected the sale, through the well-known stock brokerage firm of Hayden, Stone & Company in New York City, Beck

also arranged for the transfer of the proceeds from the account maintained by Rawson in the Chase Manhattan Bank in New York City to an account in the name of Van Beuren in a branch of the Bank of Montreal in Toronto, Canada.

(Throughout this case, the Government appears to have taken the position that Michael C. Van Beuren was merely a name that Lester had adopted, but one of the Government's most impeccable witnesses, a constable of the Canadian Mounted Police, testified that a man by that name was known to him and was a respectable Canadian citizen. As indicated above, Beck testified that Lester had told him that Lester was acting for Van Beuren and other Canadians in the sale of the Leasco warrants.

(It should also be noted at this point that the first five counts of wire and mail fraud contained in the indictment have their origin in the fact that, in the course of arranging for the sale with Rawson, Beck had sent and received four wires and one letter. The sixth count, for transporting goods as part of a scheme to defraud, derives from the fact that, after Beck had arranged for the transfer of the proceeds of the sale to the account of Van Beuren in the Bank of Montreal in Toronto, Lester had the bank send to New York City drafts drawn to the order of Van Beuren on the bank's New York agency.)

The only evidence relative to petitioner Ron, outside of Hagins' story, which is at all suspect has to do with a single incident occurring on November 12, 1969, after the Bank of Montreal had sent the aforementioned drafts to Lester. On that occasion, Beck, accompanied by petitioner and Lester, persuaded an officer of a branch of the Franklin National Bank in New York City to give Lester, posing as Van Beuren, cash in return for a $10,000 bank draft

to the order of Van Beuren drawn on the Bank of Montreal's New York agency. At the same time, Lester, still posing as Van Beuren, endorsed over to petitioner two other $10,000 bank drafts of the same tenor, and petitioner thereupon opened an account with the Franklin National Bank with one of the drafts.

On the same day, Lester flew to Toronto, where upon arrival he was arrested by the Canadian police, who had apparently been investigating his activities for some time, and thereafter Garner, Lee, Champion, Beck and petitioner were charged under the indictment in this case.

The failure of Beck or petitioner to disclose to the officer of the Franklin National Bank on November 12, 1969, that Lester was not Van Beuren is hardly as suspect as it might at first appear, when seen in the light of Beck's testimony that Lester had told him that Lester was acting for Van Beuren, and Beck's further testimony, verified by the officer of the bank, that, on the very next morning, Beck had told the officer that Lester was not Van Beuren. In any event, the incident of November 12, 1969 hardly constitutes evidence that Beck or petitioner knew that the Leasco warrants had been stolen.

Petitioner's acceptance of $20,000 from Lester is not even suspect. The evidence was ample that petitioner, who considers himself, and is considered by others, to be a rabbi, was in November 1969 and prior thereto, actively engaged in raising funds for a school in his native land of Israel from a host of individuals in this country, including many public officials and other prominent citizens who held him in high esteem. For example, petitioner had previously received substantial gifts for the school in Israel from Beck, who is a former Treasurer of the Democratic Party of the State of New York.

It seems fair to say, therefore, that without Hagins' story the Government would not even have presented this case to the grand jury.

Reasons for Granting Writ

THE PROCEDURE FOLLOWED BY THE GOVERNMENT IN THE SUBMISSION OF HAGINS' STORY TO THE GRAND JURY EFFECTIVELY DEPRIVED PETITIONER OF HIS RIGHT TO AN INDICTMENT THAT REPRESENTED THE CONSCIOUS CHOICE OF THAT BODY AND TO ANY POSSIBILITY OF DISCOVERY BEFORE OR AT TRIAL OF THE TESTIMONY OF THE GOVERNMENT'S CHIEF WITNESS AGAINST HIM.

There can be no question that the grand jury system was devised in England and developed there and here as a shield for the accused, in order to protect him against the many adverse consequences of a criminal prosecution, even one resulting in an acquittal, that might otherwise have been brought against him at the whim or caprice of King, President or lesser governmental authority. Potter, Historical Introduction to English Law and its Institutions, pp. 213-214 (2nd Ed., 1943); Somers, A Guide to the Knowledge of the Rights and Privileges of Englishmen, pp. 150-160 (1757); 1 Holdsworth, A History of English Law, 322 (4th Ed., 1927); Kaufman, The Grand Jury—its Role and its Powers, 17 FRD 331, 333-334 (1955).

That does not mean that a grand jury should be hampered in its work by technical rules or prevented from handing down an indictment upon any evidence that it deems satisfactory, including hearsay, if it deems hearsay satisfactory. Cf. *Costello* v. *United States*, 350 U.S. 359 (1956).

It would seem to imply, however, that a grand jury must make a conscious choice in arriving at its determination, and not be induced to do so by deceit. Specifically, it should know or be told when it is receiving hearsay rather than evidence consisting of the personal knowledge and recollection of an eye-witness, and it should certainly not be misled into believing that hearsay is such evidence.

Petitioner assumes that this initial proposition is axiomatic, implicit in the decision and opinion of this Court in *Costello*, and requires not the slightest modification of that decision or opinion. It has also recently found expression in a line of cases decided by the Court of Appeals to which petitioner now seeks to have a writ of certiorari issue. *United States* v. *Estepa*, 471 F.2d 1132; (1972); *United States* v. *Arcuri*, 405 F.2d 691 (1968), cert. denied, 395 U.S. 913 (1969); *United States* v. *Borelli*, 336 F.2d 376 (1964), cert. denied sub nom. *Mogavero* v. *United States*, 379 U.S. 960 (1965); *United States* v. *Umans*, 368 F.2d 725 (1966), cert. dismissed as improvidently granted, 389 U.S. 80 (1967); see also dissent of Friendly, *J.*, in *United States* v. *Payton*, 363 F.2d 996, 999, cert. denied, 385 U.S. 993 (1966), and dissent of Medina, *J.* in *United States* v. *Beltram*, 388 F.2d 449, 451 (1967), cert. denied sub nom. *Malofsky* v. *United States*, 390 U.S. 1017 (1968).

In *Estepa*, the most recently decided case among those cited immediately above, the Court of Appeals reversed a conviction and dismissed the underlying indictment for the reason that in the grand jury proceeding the Government had presented the salient facts of its case through a police officer who did not have personal knowledge of those facts, without advising the jury of the hearsay nature of its witness' testimony. In the words of the Circuit Court—

> ". . . even though '[t]here is no affirmative duty to tell the grand jury *in haec verba* that it is listen-

> ing to hearsay,' United States v. Malofsky, 388 F.2d 288, 289 (2 Cir.), cert. denied, 390 U.S. 1017, 88 S.Ct. 1273, 20 L.Ed.2d 168 (1968), the grand jury must not be 'misled into thinking it is getting eyewitness testimony from the agent whereas it is actually being given an account whose hearsay nature is concealed. . . .' United States v. Leibowitz, 240 F.2d 39, 42 (2 Cir. 1969). That was what happened here" (471 F.2d 1132, 1136).

That, petitioner respectfully submits, was also what happened in the present case, to an even greater degree. Here, the Government actively misled the grand jury concerning the hearsay nature of the F.B.I. agent's memorandum by reading the memorandum to the grand jury after placing Hagins on the stand and having him identify and "adopt" the memorandum.

It cannot be reasonably argued that the memorandum, standing alone, was anything other than hearsay, and in the Court below no such argument was made. Below, however, it was argued that the memorandum, when "adopted" by Hagins, somehow became the equivalent of primary source evidence. Any such argument is easily demonstrated to be nonsense: if true, it would have enabled the Government to follow the same procedure at the trial in this case (and in other cases, for that matter), which, of course it did not even try to do, and would not have been allowed to do had it tried.

The argument made below by the Government does, nevertheless, serve an important purpose. It precludes the Government from arguing to this Court with any force that the Government did not mislead the grand jury into believing that the F.B.I. agent's memorandum, when adopted by Hagins, was the equivalent of the latter's live testimony,

since, if the Government's trained attorneys entertained that belief, the untutored grand jurors cannot reasonably be assumed to have thought otherwise.

The accompanying advice given by the Government attorney to the grand jury merely compounded the original error. To be sure, it was the prerogative of the grand jurors to hear in person any witness "whose prior testimony had been read to them." But had they not heard Hagins in person before the F.B.I. agent's memorandum was read to them? More importantly, were they not to infer that the memorandum was "prior testimony," which, of course, it was not?

As indicated above, the procedure followed by the Government in this case also effectively deprived petitioner of his full right to a fair trial, by preventing him from obtaining discovery before or at trial of the testimony of the Government's chief witness against him. That aspect of the matter, it should be noted, was not given any consideration in *Costello* because in 1956, when that case was decided by this Court, a criminal defendant did not enjoy the opportunities for discovery he has since been afforded both by subsequent decision of this Court and by act of Congress. Cf. *Dennis* v. *United States*, 384 U.S. 855 (1966), and the Jencks Act, as amended by the Organized Crime Control Act of 1970 (18 U.S.C. § 3500(e)(3)).

It has been suggested in the prior decisions of the Court of Appeals for the Second Circuit cited above and in recent commentaries that the procedure followed by the Government in those cases may have been deliberately intended to deprive the defendant of his opportunities for discovery, and, specifically, to deprive him of the means to impeach a key Government witness by pointing out inconsistencies between the witness' testimony before the grand jury and

the witness' testimony at trial. (See cases cited *supra*, p. 10; also, Note, 43 N.Y.U.L. Rev. 578, 581 et seq. (May 1968); Knudsen, Pre-Trial Discovery of Federal Grand Jury Testimony, 48 Wa sh. L.Rev. 423 (1972).

In *Estepa*, the Court of Appeals indicated that one ground for its decision to reverse the conviction and dismiss the indictment therein was the meagre excuse offered by the Government for failing to bring its eye-witness before the grand jury (471 F.2d 1132, 1134). In the present case, the Government actually brought its eye-witness before the grand jury, only to lead him away without giving the grand jury the benefit of hearing his story in his own words and based on his own personal knowledge and recollection. Here, therefore, there was no excuse whatsoever for the conduct of the Government and no reason for it except to shield Hagins against subsequent impeachment and thereby to deprive petitioner and his co-defendants of a valuable pre-trial and trial device.

Petitioner respectively submits that the time has come for this Court to review the broad rule laid down in *Costello* in the light of the developments in the law of discovery in criminal cases since 1956, and to refine that rule to the limited extent necessary to prohibit the Government from misusing it to deprive a defendant in any such case of his opportunities for discovery. At this point, petitioner respectfully suggests, the Court need not go beyond the facts of this case, nor do more than to proscribe the procedure followed by the Government herein, in which a key witness is brought before a grand jury merely to identify and "adopt" a memorandum prepared by a Government agent, even though the witness' entire live testimony relative to the facts of the case within his personal knowledge and recollection would neither be extensive nor complicated.

Any such modification or refinement of the rule in *Costello* will hardly affect the grand jury system in this country adversely, if at all. It will, however, insure a defendant in a criminal case of his full right to a fair trial.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

WILLIAM J. BUTLER and
STANLEY GELLER
Counsel for Petitioner
400 Madison Avenue
New York, New York 10017

Dated, New York, New York
November 26, 1973

Appendix—Order of Affirmance of The United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

Corrected Copy

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of October one thousand nine hundred and seventy-three.

Present:

HON. LEONARD P. MOORE
HON. PAUL R. HAYS
HON. WILFRED FEINBERG

Circuit Judges,

UNITED STATES,

Plaintiff-Appellee,

—against—

LOUIS BECK, WILLIAM CHAMPION, COLLIN GARNER, FREDERICK LEE, EMANUEL LIEBERMAN a/k/a, MANNIE LESTER, and AHARON RON,

Defendants,

AHARON RON, COLLIN GARNER, FREDERICK LEE,

Defendant-Appellants.

73-1553
73-1658
73-2119

Order of Affirmance of The United States Court of Appeals

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk

By: Vincent A. Carlin
Chief Deputy Clerk

COURT, U. S.

Nos. 73-850, 73-5825 and 73-5891

In the Supreme Court of the United States

OCTOBER TERM, 1973

AHARON RON, PETITIONER

v.

UNITED STATES OF AMERICA

COLLIN GARNER, PETITIONER

v.

UNITED STATES OF AMERICA

FREDERICK LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-850

AHARON RON, PETITIONER

v.

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COLLIN GARNER, PETITIONER

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FREDERICK LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals wrote no opinion. The district court wrote no opinion dealing with the issues presented by these petitions.

JURISDICTION

The judgment of the court of appeals (R. Pet. App.)[1] was entered on October 31, 1973. The petitions for writs of certiorari in Nos. 73-850 (Ron) and 73-5825 (Garner) were filed on November 29, 1973. The petition in No. 75-5891 (Lee) was filed on December 1, 1973, and is out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an indictment that is based in part on a government agent's memorandum reporting statements made by another person, and on testimony by that person that the memorandum was a fair and accurate summary of what he knew about the matter

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[1] "R. Pet." refers to Ron's petition (No. 73-850), "G. Pet." to Garner's petition (No. 73-5825), and "L. Pet." to Lee's (No. 73-5891). "R." refers to the numbered documents in the certified record on file in the Clerk's office. Document No. 58 ("R. 58") consists of the transcripts of four pre-trial conferences, held on June 30, September 8, September 13, and November 9, 1972; because the transcripts are separately paginated, it is necessary to identify them by date. "Tr." refers to the trial transcript, in four consecutively paginated volumes. "D.E." refers to the docket entries, which appear at the end of the group of papers captioned "Index to the Record on Appeal."

under inquiry, is invalid because the maker of the statements did not testify at first hand concerning the events within his knowledge (presented by all three petitions).

2. Whether the right to counsel of petitioner Garner, who was unrepresented during the first three days of the nineteen-day trial, was violated in the circumstances of this case (No. 73-5825 only).

3. Whether the evidence was sufficient to support the conviction of petitioner Lee (No. 73-5891 only).

STATEMENT

Petitioners and three co-defendants, William Champion, Louis Beck, and Emanuel Lieberman (referred to herein by his alias, "Lester"), were charged in a seven-count indictment filed in the United States District Court for the Southern District of New York with using wire communication facilities and the mails in furtherance of a scheme to defraud (Counts One through Five), transporting in foreign commerce bank checks known to have been taken by fraud (Count Six), and conspiracy to commit these offenses (Count Seven), in violation of 18 U.S.C. 1343, 1341, 2314, and 371, respectively (R. 1). Following a jury trial, each petitioner was convicted on the conspiracy count, and petitioner Ron was also convicted on all but one of the substantive counts (Tr. 2924-2927).[2]

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[2] Ron was acquitted on Count Four, involving one of the charged wire communications (Tr. 2926). Petitioners Garner and Lee were acquitted on all of the substantive counts (Tr. 2936-2937). Co-defendant Champion was acquitted on the

Petitioner Ron was sentenced to concurrent terms of five years' imprisonment on Counts One, Two, and Three, and to concurrent terms of five years on Counts Five, Six, and Seven, to run consecutively to the sentences on the first three counts (a total of ten years), subject to the early parole eligibility provisions of 18 U.S.C. 4208(a)(2). He was also fined $5,000 on each of Counts Six and Seven (R. 57). Petitioner Garner was provisionally sentenced to five years' imprisonment, subject to the study provisions of 18 U.S.C. 4208(b) and (c) (R. 45). Petitioner Lee was sentenced to three years' imprisonment, execution of all but three months of which was suspended (R. 46). The court of appeals affirmed.

1. The alleged scheme involved the theft of stock warrants by petitioners Garner and Lee and co-defendant Champion; the arrangement by co-defendant Beck (an associate of petitioner Ron) with a Bahamian trust company for the sale of the warrants without disclosure that they were stolen; deposit of the proceeds in two Canadian banks under a fictitious name; and the receipt by co-defendant Lester, through use of that fictitious name, of $10,000 in partial realization of the scheme's objectives (R. 1, pp. 1-3). Except with respect to Beck (not a petitioner, see note 2, *supra*), the evidence was not in dispute. Because

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substantive counts, and the jury was unable to agree on a verdict as to the conspiracy count (Tr. 2951-2952). The jury was unable to agree as to any count with respect to co-defendant Beck (Tr. 2951). Co-defendant Lester was incarcerated in Canada at the time of trial, and his case was severed.

only petitioner Lee challenges the sufficiency of the proof to sustain his conviction, only the evidence pertinent to him will be summarized.[3]

In the fall of 1969, several hundred thousand dollars' worth of Leasco Data Corporation stock warrants were stolen from Goodbody & Company, a Wall Street brokerage firm that employed petitioner Lee and co-defendant Champion (Tr. 948-956, 1449-1460, 1480-1500, 1586-1595, 1608-1612, 2738-2740). In October 1969, co-defendant Lester, to whom petitioner Garner had been introduced by Joseph Hagins (a self-acknowledged co-conspirator who testified for the government), asked Garner if he had access to the securities of a brokerage house. Lester said he was particularly interested in Treasury notes and advised that he would pay fifty per cent of the face value of any such securities Garner could furnish him (Tr. 378-379, 398-400). Garner introduced Hagins to Lee and Champion, who expressed interest in Lester's proposal and asked Hagins if Lester could be trusted not to cheat them. Hagins vouched for Lester's reliability (Tr. 401-416). Garner told Lester about the meeting with Lee and Champion and advised him that the "parties involved" thought it would be best to deal in warrants, because warrants were not watched as carefully as other securities at "the house" (Tr. 525-526).

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[3] Because of the close association between Lee and petitioner Garner, the same evidence, as will be noted, was equally pertinent to Garner. Petitioner Ron has not contested here or below the sufficiency of the evidence supporting his conviction. Indeed, Ron filed no brief in the court of appeals.

A few days later Garner delivered to Lester warrants of Leasco Data Corporation worth $850,000, endorsed in the Goodbody "street name," together with a number of Leasco warrants that were registered in the names of individuals and trust companies (Tr. 417-420, 518-524). Garner and Lester separated the "street name" warrants from the privately registered ones, Garner explaining to Hagins (who was present) that the privately registered warrants were "no good" and would be destroyed (Tr. 419-420, 518, 520-521). After Garner, using a Goodbody rubber stamp he had brought with him, had stamped the "good" warrants, Lester paid him $1,000 as a "good faith gesture" (Tr. 418-419, 522, 524-525).

Two days later Lester, whose agreement with Garner had been that he would pay fifty per cent of the warrants' value within ten days of delivery, told Hagins he would not be able to keep this commitment because the warrants could not all be sold within so short a time without unduly depressing the price (Tr. 524-525, 527-530). Lester proposed that they be sold in blocks, at weekly intervals, and that Garner and his associates be paid $50,000 a week until all had been sold (Tr. 530). Hagins advised Garner, Lee, and Champion of the problem and of Lester's proposal (Tr. 531-533). A week later, when Lester was also unable to satisfy the modified commitment, he gave Hagins a $5,000 check of petitioner Ron's with which to placate Garner and his principals, and he told Hagins that he could get in touch with Ron whenever he wished to communicate with Lester (Tr. 533-539).

Through Ron, Hagins met co-defendant Beck, who had copies of the warrants and asked Hagins whether more were available (Tr. 556-562).

Following Beck's arrangement for the sale of the warrants and the deposit of the proceeds in the Canadian banks (activities with which Lee, so far as appears, had no connection),[4] Lester received two checks, representing part of the proceeds, drawn on the Bank of Montreal and payable to "Michael Van Beuren" (the ficitious name under which the proceeds had been deposited in Canada). Lester tried to cash the checks, in the amounts of $70,000 and $20,000, at the New York agency of the Montreal bank. The agency refused to cash the checks but, at Lester's request, issued him nine $10,000 checks in exchange for them (Tr. 574-577, 1114-1127). Another bank, after Lester had been introduced to it by Beck as Van Beuren, cashed one of the $10,000 checks (Tr. 577-582, 1158-1188). Lester gave the $10,000 to Hagins, who delivered it to Lee (Tr. 582-585). Lee gave Garner and Hagins each $1,000 and kept $8,000 (Tr. 585-586).

The conspirators' further plans were interrupted shortly afterward when Canadian authorities arrested Lester (Tr. 586-587, 593-595, 1275-1281).

2. Hagins appeared before the indicting grand jury, identified a memorandum in which an F.B.I. agent had reported statements made by Hagins about

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[4] The substantive counts charging use of the mails and of wire communication facilities involved communications to and by Beck in connection with these transactions (R. 1, pp. 3-5).

the matter under inquiry, said he had read the memorandum, and testified that it was a fair and accurate summary of his knowledge of the facts stated in it. The foreman then excused the witness at the request of government counsel and the prosecutor read the memorandum to the grand jury. The grand jury was advised that it had the right to hear live testimony from any witness it chose (G. Pet. App. A5, A8-A9).[5] Copies of the memorandum and of the transcript of Hagins' grand jury testimony concerning it were supplied to each defendant at trial (Gov. Exs. 3519, 3522; Tr. 433, 549-553, 790, 812), and the documents were used by the defense for impeachment purposes during Hagins' cross-examination (Tr. 705-708, 729-733, 764-768, 787-788, 792-799).

ARGUMENT

1. There is no merit to petitioners' contention that the indictment was invalid because it was improperly based on the F.B.I. agent's hearsay memorandum reporting statements made by Hagins about the subject of inquiry (R. Pet. 2, 9-14; G. Pet. 2, 6-8; L. Pet. 19). They claim that, since Hagins was available as a witness and in fact testified before the grand jury, he should have been interrogated at first hand and in detail about the facts within his knowledge,

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[5] In addition to the report and Hagins' testimony with respect to it, the grand jury heard live testimony by at least four other witnesses and verbatim transcripts of the testimony of twelve additional witnesses before a prior grand jury (G. Pet. App. A8-A10).

and that it was improper for the prosecutor, after establishing through Hagins that the memorandum accurately summarized what he knew of the matter, to excuse him and simply read the memorandum. But even if the memorandum had constituted the entire evidence before the grand jury, an indictment returned on that basis would not have been subject to challenge. *Costello* v. *United States*, 350 U.S. 359 (indictment valid though based entirely on hearsay). An indictment is surely no less valid where the declarant actually attests to the correctness of the statements attributed to him. Indeed, such testimony in effect transforms what was hearsay into direct evidence. At least where, as here, the grand jury is specifically told it has the right to hear live testimony from any witness it chooses, there can be no valid objection to the procedure, employed here, of reading to the grand jury a compact summary by an investigative agent, the accuracy of which is vouched for by the declarant, of statements the agent deemed relevant to the inquiry.

There is no substance to petitioner Ron's suggestion that the procedure employed had the effect of shielding Hagins at trial against the possibility of impeachment based on prior inconsistency (R. Pet. 12-14). By attesting to the correctness of the agent's report of his statements, Hagins in effect adopted the reported statements as his own and made himself liable to impeachment on the basis of them. Indeed, attempts were in fact made at trial to impeach Hagins on the basis of the statements and his testimony.

United States v. *Estepa*, 471 F. 2d 1132 (C.A. 2), relied on by petitioners, is not in point. There, a conviction was reversed and an indictment ordered dismissed because the grand jury had been misled into thinking it was hearing eyewitness evidence when in fact the testimony presented had been hearsay. No such deception was involved here.

2. Petitioner Garner was unrepresented by counsel during the seven months preceding, and the first three days of, the four-week trial. He contends that his constitutional right to counsel was thus violated (G. Pet. 2-6).[6] The relevant facts are as follows:

The indictment was returned on February 24, 1972, and trial commenced a year later, on February 6, 1973 (R. 1; D.E. 4).[7] From March 6 to July 12, 1972—during which period all preliminary motions were filed, heard, and submitted[8]—Garner and petitioner Lee were jointly represented by retained

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[6] Petitioner Lee "incorporates by reference" the "points" urged by Garner in his petition (L. Pet. 19). However, Garner's contention with respect to counsel is inapplicable to Lee. Following the dismissal of the two petitioners' jointly-retained initial attorney (see *infra*), substitute counsel was assigned Lee (substantially in advance of trial), and that attorney continued to represent him for the balance of the proceedings (cf. L. Pet. 3).

[7] The trial ended March 5, 1973, following nineteen days of actual proceedings (D.E. 4-5).

[8] The motions filed on Garner's behalf included, among others, detailed requests for discovery, inspection, and particulars, and for a severance. They were granted in part and denied in part in a two-page order entered October 31, 1972 (R. 27).

counsel, H. Spencer Kupperman (R. 2, 7, 13, 20, 27; R. 58, June 30, 1972, pp. 14-23). On June 5, 1972, Kupperman requested leave to withdraw as counsel for Garner on the ground that Garner's and Lee's interests conflicted (R. 35).[2] In an affidavit accompanying this request, in addition to noting the conflict, Kupperman advised that "fees were a problem" with Garner; that Garner, though employed, was having difficulty paying the agreed retainer; and that, in the attorney's opinion, Garner would qualify for court-appointed counsel (R. 35, pp. 2-3).

At a hearing held on June 30, 1972, the court determined that, in view of the reported conflict, Kupperman would be unable to represent either client further and directed Garner to report with new counsel on July 12 (R. 58, June 30, 1972, pp. 14-19). The court expressed the opinion to Garner that the twelve-day interval would give him ample time in which to obtain a new attorney; requested that he make every effort to do so; and said it would be necessary, if he did not, to keep adjourning the proceedings until he succeeded (*id.* at 17). In response to a suggestion by government counsel that it might be worthwhile to inquire whether Garner qualified to have counsel appointed, the court noted that Garner had not indicated that he was unable to obtain counsel and observed that it would be preferable from Garner's standpoint that he have an attorney of his own choosing. In response to inquiries by the court,

[2] The attorney advised in his affidavit that the conflict did not affect the preliminary motions (R. 35, p. 2).

Garner said he was aware that if he were indigent and could not afford counsel the court would appoint an attorney for him, but that the attorney would be from the court's panel and would be selected by the court, not him. He said he wished to choose his lawyer himself (*id.* at 18).

On the adjourned date, July 12, 1972, proceedings involving co-defendants were held (D.E. 3), but whether Garner attended does not appear; in any event, he had not yet retained new counsel. The next reference to Garner in the record is a docket entry for July 20, 1972, stating that there was "[n]o appearance" by him on that date and that a bench warrant for his apprehension was issued (*ibid.*).[10] The pertinent circumstances do not appear.

On September 13, 1972, two weeks after the government had announced its readiness for trial (R. 22), an attorney named Alfred Toombs appeared with Garner at a pre-trial conference, advised the court that he and Garner had discussed and agreed on a retainer, and requested that he be allowed two weeks to decide whether he would undertake to represent him (R. 58, September 13, 1972, p. 2). The attorney explained that his prospective client was employed but had to make certain arrangements to get the money (*ibid.*). The court, noting that if Toombs decided to take the case there would be unavoidable delays resulting from his having to familiarize himself with what had so far occurred and to file such

[10] Garner had been free on his personal recognizance bond, in the amount of $10,000, since March 8, 1972 (R. 4).

additional motions as he might wish, asked the attorney to decide within a week whether he would accept the retainer. Toombs agreed (*id.* at 2-3). Government counsel, observing that Garner had had two months in which to secure new counsel, objected to the delay and requested that the attorney be required to decide then whether he would file his appearance. The court noted that the delays to date had not been Toombs' fault and denied the request (*id.* at 3-4). After conferring with Garner and being informed that his payday was the 20th, Toombs requested that he be given till the 21st to advise whether he would take the case. The court consented (*id.* at 5). The court advised the attorney that it would expect him to file his appearance on the 21st if Garner made a substantial payment on account by that date, and Toombs indicated that this would be satisfactory (*id.* at 6-7). Government counsel, pointing out that Garner had had a retained attorney, that he presumably had the means to retain another, and that he was aware he could ask to have counsel assigned if he did not have the means, asked the court to instruct Garner that, if his arrangement with Toombs did not work out, he should appear on the 21st with other counsel. The court denied the government's request but elicited from Garner the assurance that he understood the importance of his taking care of the representation matter promptly (*id.* at 6, 8). For reasons that do not appear, Toombs was not employed by Garner.

On November 9, 1972, the court informed Garner that the case was set for trial on February 5, 1973.

Garner said he was "working on" the matter of securing counsel (R. 58, November 9, 1972). On December 12, 1972, a second bench warrant for Garner's apprehension was issued (D.E. 4); the relevant circumstances do not appear in the record. On January 17, 1973, Garner appeared in court, the bench warrant was vacated, and he was instructed to appear for trial on February 6 (*ibid.*).

Trial commenced, as scheduled, on February 6, 1973, Garner appearing *pro se* (D.E. 4). The first day's proceedings (which evidently were limited to empaneling the jury) have not been transcribed. On the second day, February 7, following the making of opening statements to the jury (Tr. 102-159),[11] an attorney named Michael Standard appeared, advised the court that a friend of Garner had asked him to discuss with Garner the matter of representation, and requested leave to confer with him (Tr. 165-166). Prior to granting the requested permission, the court stated to the attorney that Garner was in the posture of a person who worked, was not indigent, and was capable of paying a reasonable attorney's fee but who had been unsuccessful in obtaining counsel; that the court had admonished Garner to present his problem to the Bar Association,[12] but that he had not done so; that apart from that fail-

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[11] In a brief *pro se* opening, Garner denied criminal involvement and said he was waiting for his lawyer to arrive (Tr. 152).

[12] The record does not indicate when this admonition was given.

ure, he had made what the court felt had been reasonable efforts to get a lawyer; and that if Standard or one of his associates could accept his retainer, the court would accommodate the interests of all concerned to every extent possible, except that, because the court believed Garner had had more than ample opportunity to secure representation, it would not entertain a motion for a severance (Tr. 166-167; G. Pet. App. A1-A2). After conferring with Standard, Garner informed the court that Standard had said he would be unable to represent Garner due to a conflicting court engagement, but that he would have an associate communicate with Garner the next day to see whether he could take the case (Tr. 173).

On the following day, Garner advised the court that he had been told by Standard that the associate would also be unable to represent him because his schedule too precluded it, but that Standard was making other arrangements to get him a lawyer and that Garner should call him at the end of the day's proceedings (Tr. 358). Shortly thereafter Garner asked the court whether he would be entitled to appointed counsel if he did not have a job. The court said he would be so entitled if he had no job and no money, but that the court would not be party to an arrangement whereby Garner would quit his job in order to make himself indigent (Tr. 360-361; G. Pet. App. A3-A4). In reply to a comment by the trial judge that he wished Garner had gone to the Bar Association, as the court had "practically directed" him to do, Garner said that he had called someone

at the Bar Association, learned that he was out, and waited for him to call back, but that the person had not done so and Garner had been "scared" to pursue the matter further (Tr. 361; G. Pet. App. A4).

Following the proceedings on February 8, the trial was recessed to February 13 (Tr. 429). On February 12, Garner retained H. Miles Jaffe, his present counsel, to represent him (Tr. 438), and Jaffe did so for the balance of the trial. On February 13 Jaffe moved for a mistrial as to Garner, noting his lack of counsel during the trial's first three days (Tr. 440-441). Government counsel, opposing the motion, noted among other things that only two witnesses had completed their testimony and that their testimony, transcripts of which had been supplied Jaffe, hardly touched on Garner;[13] that the third witness, Hagins, who had implicated Garner, was still on the stand, and had not gone very far in his testimony;[14] and that Jaffe had had the Hagins-related "3500 [Jencks Act] material" since the previous day—substantially sooner than he would have been entitled to it even if he had been in the case from the beginning (Tr. 441-442). In denying the motion for mistrial, the court noted that Garner had failed to do all he should have done (and that the court had urged him to do) to secure counsel sooner (Tr. 443-444). The court also

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[13] Actually, neither witness had referred to Garner at all (Tr. 174-232, 238-352).

[14] Hagins had commenced testifying on the afternoon of the last previous day of proceedings (Tr. 353) and had not yet concluded his direct testimony.

said it believed that Garner had not been significantly prejudiced by his lack of counsel so far in the trial, noting in this regard, *inter alia*, that Garner had handled himself very well in his opening statement to the jury and had come "through to the jury as a sincere person who [was] conducting himself with complete propriety * * *" (Tr. 443). The court advised Jaffe that it would be open to him, should he feel he could point to any specific thing during the rest of the trial that suggested that Garner had been prejudiced by his previous lack of counsel, to renew his motion, and that the court would then reconsider the matter (Tr. 443-444). The matter was not again raised.

Garner contends that the issue presented is whether a defendant who is financially unable to retain counsel has a right to assigned counsel although he is not indigent (G. Pet. 2, 5-6). But the record fails to support the implied claim that Garner was financially unable to retain counsel. Garner had a retained attorney initially, and he was represented at trial by retained counsel. Kupperman, the intially retained attorney, was relieved of his duties only because of the reported conflict of interests between his clients. Between the time of Kupperman's discharge and the employment of Jaffe, Attorney Toombs and Garner discussed and agreed on a retainer, which the attorney indicated would be acceptable if he received a substantial payment on account by Garner's next payday. Why the discussed employment did not follow does not appear in the record. Attorney Standard

and his associate, the other lawyers involved in the proceedings prior to the employment of Jaffe, were unable to take Garner's case, but the reasons, the record indicates, involved schedule conflicts, not financial considerations.

Knowing he was entitled to have an appointed attorney if he lacked the financial means to employ one, and having advised the court that he wished to select his own counsel, Garner had seven months between the discharge of his first attorney and the commencement of trial within which to retain a successor. Aware that Garner's financial circumstances were modest, the court was of the view—correctly as events proved—that with proper efforts he would be successful in retaining new counsel. The court contemplated that those efforts would include a request by Garner for assistance from the Bar Association—a course the court "practically directed" Garner to follow. Garner, as he acknowledged to the court, never pursued the suggested course beyond the placing of an unreturned phone call. While the court believed that Garner had made reasonable efforts apart from that failure to find new counsel prior to the start of the trial, the court also felt that Garner's omission to take the action he had been requested to take was a substantial contributing cause of his failure to secure counsel sooner than he did. The court concluded, in other words, that it was largely Garner's own fault that he was required to go to trial unrepresented. Especially since Garner showed he was able to retain counsel speedily enough once trial

had started, that judgment, it is submitted, cannot be faulted. Cf. *United States* v. *Arlen*, 252 F. 2d 491 (C.A. 2); *United States* v. *Abbamonte*, 348 F. 2d 700 (C.A. 2), certiorari denied, 382 U.S. 982; *United States* v. *Terry*, 449 F. 2d 727 (C.A. 5). The court's refusal to grant a mistrial involved an exercise of sound discretion, not shown to have been abused, in a difficult situation that had arisen out of a unique combination of circumstances. No question of general importance to the administration of the criminal laws, or other issue warranting plenary review by this Court, is presented.

3. There is no merit to petitioner Lee's contention that the evidence was insufficient to support his conviction (L. Pet. 14-18). Lee concedes the sufficiency of the proof that he and Champion stole the warrants (L. Pet. 17) but argues that the evidence failed to link him with Beck or the international dealings through which Beck disposed of them. The evidence showed, however, that Lee was party to a conspiracy with, at least, Garner, Champion, Hagins, and Lester to sell on consignment stolen securities which he and Champion were to furnish. While Lee may not have known Beck, he knew that Lester and persons associated with him were involved in fencing the warrants. It is not important that Lee may not have known who else was involved, or exactly how disposition of the warrants was to occur. Cf. *United States* v. *Edwards*, 366 F. 2d 853, 866-867 (C.A. 2), certiorari denied *sub nom. Jakob* v. *United States*, 386 U.S. 908; *United States* v. *Agueci*, 310 F. 2d

817, 826-827 (C.A. 2), certiorari denied, 372 U.S. 959.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973

No. 73-850

AHARON RON,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONER AHARON RON

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April 9, 1974

IN THE
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-against-

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REPLY BRIEF OF PETITIONER AHARON RON

Petitioner Ron finds it necessary to submit this brief to respond to certain statements and points made in the Government's brief that are misleading.

I

THE STATEMENT THAT PETITIONER DOES NOT CHALLENGE THE SUFFICIENCY OF THE EVIDENCE AGAINST HIM

The Government does not discuss the evidence against petitioner Ron on the theory that he does not challenge the sufficiency of that evidence (Br., p. 5). The theory is hypertechnical, to say the least.

Petitioner Ron pointed out in his initial brief that the Government's case against him (to the effect that he participated in some degree in the sale of the allegedly stolen warrants, with knowledge that they had been "stolen") rested entirely on the trial testimony of the Government's witness Hagins (see Ron's Pet., pp. 6-7), a point the Government does not even attempt to challenge. Ron then argued, and now argues, that his conviction should be reversed because his ability to impeach Hagins at the trial was effectively destroyed by the ploy adopted by the Government upon Hagins' appearance before the grand jury, where the Government did not allow Hagins to tell his story directly to the grand jury, but relied instead upon Hagins' "attestation" to the "correctness" of an F.B.I. agent's report of what Hagins had allegedly told the agent previously.

In effect, therefore, Ron does attack the sufficiency of the only evidence against him, since he attacks the validity of Hagins' entire trial testimony under the circumstances that such testimony was presented. In this respect, it should be noted that in his petition herein, Ron not only challenges the judgment against him as unconstitutional under the Fifth Amendment, on the ground that his indictment by the grand jury was improperly and illegally obtained, but under the Sixth Amendment as well, on the ground that his conviction by the petit jury was also improperly and illegally obtained, because he could not effectively impeach the Government's witness, Hagins, when the latter testified against him at his trial.

II

THE STATEMENT THAT HAGINS' "ATTESTATION" TO THE "CORRECTNESS" OF THE F.B.I. AGENT'S REPORT "IN EFFECT TRANSFORMS WHAT WAS HEARSAY INTO DIRECT EVIDENCE"

In its brief, the Government persists in the error made by it before the grand jury, claiming that Hagins' brief testimony before that body was the equivalent of "direct evidence" (Br., p. 9). Petitioner Ron urges this Court, more vigorously than ever, to consider the import of this egregiously erroneous argument. If the Government believes it, how can it be said that the grand jury did not also believe it? And, if the grand jury believed it, how can it be said that the grand jury was not misled and its indictment of petitioner Ron improperly and illegally obtained?

Hagins' grand jury testimony consisted only in his stating that the F.B.I. agent's report contained "a fair and accurate summary of the knowledge [Hagins had] concerning the activities it discusses" (Pet., p. 4; emphasis supplied). In the agent's report, which Hagins read just before he went into the grand jury room, was the statement that he had told the agent that Ron had asked Hagins if the warrants had been stolen, whereupon Hagins had answered affirmatively (Pet., p. 6). Hagins, although given the opportunity, never so testified at the trial (Ibid.).

The more than nagging conclusion to be drawn from what transpired in the grand jury room is that what got to the grand jury, in respect of the

particular matter here under consideration, was not objective fact, but rather subjective conclusions drawn, first by the F.B.I. agent and then by Hagins -- i.e., the conclusion of the agent, after he had interviewed Hagins, that the latter, having allegedly discussed the warrants with Ron, must have told Ron that they were stolen, and the subsequent conclusion of Hagins, when he was briefly on the witness stand in the grand jury room, that the agent's report was a "summary" of Hagins' "knowledge." (Indeed, the F.B.I. agent's report has Hagins stating that "he also realized that Beck had to know the securities were stolen" [Pet., p. 6; emphasis supplied].) That, of course, reflects only Hagins' state of mind in respect of Beck, an alleged co-conspirator. Did the agent, in his enthusiasm, convert what was Hagins' state of mind in respect of Ron into objective reality? We can reasonably believe that he did so in light of Hagins' subsequent testimony before the petit jury. The critical point, however, is that Hagins' "attestation" before the grand jury of the "correctness" of the agent's report far from transforms that report into "direct evidence"; on the contrary, it merely compounds the hearsay, by giving to the grand jury Hagins' hastily formed impression of whether the agent's impression of what Hagins had previously told the agent was an accurate summary of what Hagins had actually told the agent!

The Government argues that the present case is distinguishable from United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972), where it admits "a conviction was reversed and an indictment ordered dismissed because the grand jury had been misled into thinking it was hearing eyewitness evidence when in fact the testimony presented had been hearsay" (Br., p. 10; emphasis supplied). It would be difficult to

put into words a more succinct characterization of the relief sought by petitioner in the present case and the primary ground on which he seeks such relief.

III

THE STATEMENT THAT, BY "ATTESTING" TO THE "CORRECTNESS" OF THE AGENT'S REPORT, HAGINS MADE HIMSELF LIABLE TO IMPEACHMENT ON THE BASIS OF THE REPORT

The final statement on behalf of the Government in response to Ron's petition is little short of outrageous. It suggests that, since Hagins in effect adopted the agent's report, he could have been impeached on the basis of that report, just as if the report had been his own testimony (Br., p. 9).

That suggestion is patently erroneous even as a general proposition, since, quite obviously, a witness in Hagins' position can divorce himself from particular language used in an agent's notes, and can even divorce himself from the substantive import of particular statements in those notes, without doing much, if any, damage to his credibility. Indeed, Hagins did so at the trial on some occasions when the attorneys for defendants other than Ron sought to impeach him on the basis of the agent's report.

It is when, however, the Government's suggestion is applied to the particular facts of Ron's case that it becomes outrageous. The most critical

divergence between the agent's report and Hagins' testimony at the trial related to what Hagins had told Ron concerning the warrants. According to the agent's report, Hagins had told Ron the warrants were stolen, but Hagins refused to testify to that effect at the trial. At first glance, perhaps, that is a divergence that could have been used to impeach Hagins' credibility. After only brief consideration, however, it becomes quite clear that it could have been used only at the risk of bringing to the (trial) jury's attention a statement concerning Ron's alleged guilty knowledge that would have been as damaging as it was untrue!

Conceivably, it might be argued that the same result might have obtained if the Government had not resorted to the ploy of having Hagins "attest" to the "correctness" of the agent's report, but had allowed him to tell his story directly to the grand jury. Any such argument, however, merely serves to emphasize the vice of the Government's improper strategy. It seems quite clear that had Hagins been allowed to tell his story directly to the grand jury, he would not have told that body that he had informed Ron the warrants had been stolen, since he did not so testify before the petit jury.

Nor can the Government counter the foregoing with the argument that, had Hagins told his story directly to the grand jury, there would not have been the startling divergence referred to hereinabove, and thus his grand jury testimony could not have been used to impeach him. That argument begs the question. It is the essence of petitioner Ron's position that had Hagins been allowed to testify before the grand jury, there might

have been any number of other inconsistencies between that testimony and his trial testimony that might have been used to impeach his credibility.

That Hagins' credibility is open to question is not just a theoretical proposition. It is a matter of record that shortly after Ron filed his petition in this Court, Beck and Champion, who were tried with Ron, were retried together with Lester, the alleged leader of the conspiracy, who was in jail in Canada at the time of the first trial, and that all three were acquitted! Thus, Ron, who, even according to the Government's case, played the smallest part of any participant in the sale of the warrants (as opposed to the alleged theft of those securities, in which he concededly had no part) faces a ten-year jail sentence, based on Hagins' testimony, while Beck, who actually arranged the sale, and Lester, who was the alleged "mastermind," have been absolved of any legal guilt!

In light of the foregoing, petitioner respectfully submits that a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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April 9, 1974